EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RANI ALLAN, *Plaintiff,* v. DANIEL GIGI, ET AL., *Defendants*.	Civil Action No. 1:23-cv-867

ORDER

On November 8, 2023, the Court held a hearing on Defendant Arlington County's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, [Doc. No. 20] (the "County's Motion"), and on Defendants Robert Stanley and Carly Whisner's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, [Doc. No. 25] (the "Officers' Motion"), and for the reasons stated from the bench, it is hereby

ORDERED that the County's Motion is **GRANTED** and Count II of the Amended Complaint be, and the same hereby is, **DISMISSED** as to the County pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim; and it is further

ORDERED that the Officers' Motion is **GRANTED** and Counts I, III, and IV of the Amended Complaint be, and the same hereby are, **DISMISSED** as to the Officers pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

The Clerk is directed to forward a copy of this Order to all counsel of record.

November 13, 2023
Alexandria, Virginia

Anthony J. Trenga
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RANI ALLAN,	)	Case 1:23-cv-867
	)	
Plaintiff,	)	
	)	
v.	)	Alexandria, Virginia
	)	November 8, 2023
DANIEL NATHAN GIGI, SHLOMO GIGI, ARLINGTON COUNTY, CARLY WHISNER, and ROBERT STANLEY,	)	11:02 a.m.
	)	
Defendants.	)	
	)	Pages 1 - 66

TRANSCRIPT OF MOTION TO DISMISS

BEFORE THE HONORABLE ANTHONY J. TRENGA

UNITED STATES DISTRICT COURT JUDGE

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

APPEARANCES:

FOR THE PLAINTIFF:

JORDAN D. HOWLETTE, ESQUIRE
J.D. HOWLETTE LAW, PLLC
1140 Third Street, N.E., Suite 2124
Washington, D.C. 20002
(202) 921-6005

FOR DEFENDANTS CARLY WHISNER AND ROBERT STANLEY:

BLAIRE H. O'BRIEN, ESQUIRE
HARMAN, CLAYTOR, CORRIGAN & WELLMAN, PC
Innsbrook Corporate Center
4951 Lake Brook Drive, Suite 100
Glen Allen, Virginia 23060-9272
(804) 662-1103

FOR DEFENDANT ARLINGTON COUNTY:

RYAN C. SAMUEL, ESQUIRE
WHITNEY DAVIS, ESQUIRE
ARLINGTON COUNTY ATTORNEY'S OFFICE
2100 Clarendon Boulevard, Suite 403
Arlington, Virginia 22201
(703) 228-3100

ALSO PRESENT: RANI Allan

prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal."

Plainly, the allegations here are insufficient to establish a failure to train claim. There's no allegations that will put the county on notice of the specific training inadequacy that would have caused an alleged Fourth Amendment or equal protection violation.

And so the complaint should be dismissed with prejudice as to the county. I'm happy to answer any questions you have.

THE COURT: All right. Thank you.

Let me rule on the motion to dismiss.

Let me also just say as a preliminary comment that the Court understands completely why someone in the plaintiff's position would think he was terribly treated unfairly, but the claim has to be judged against several principles of law and also understand that someone might think those principles don't

adequately account for all considerations that should be taken into account. The Court is bound by the established law in this area, and the Court is going to apply those to this claim.

Here the plaintiff, Mr. Allan, has filed an action consisting of joined federal and state law claims against his former landlord; two Arlington County police officers, Whisner and Stanley; and also, the county relating to a conflict between Mr. Allan and Daniel Gigi that resulted in an altercation and subsequently led to Mr. Allan's arrest.

Based on his July 5, 2023, arrest, Mr. Allan asserts claims against the responding officers, Whisner and Stanley, for 1983 violations based on the Fourth Amendment and equal protection grounds in Counts 1 and 3, a state law claim for false arrest in Count 4, and a 1983 *Monell* claim against the county in Count 2.

Let me just first address this issue of the audio recording which the Court allowed to be filed. The Court has not considered the substance of that, and I don't think it technically falls within the exception to the rule that the allegations in the complaint are solely to be considered.

Again, in considering a motion to dismiss, except where documents are explicitly incorporated or

attached to the complaint or integral to the complaint, simply quoting from some portion of a document doesn't give it independent, equal significance to the plaintiff's claim. So the Court will rule on the motion to dismiss without reference to the audio recording.

Let me first address Count 1 of the claim pertaining to plaintiff's claim under 1983 based on the violation of equal protection.

The equal protection clause in the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The equal protection requirement keeps governmental decision makers from treating differently persons who are in all relevant respects alike. As such, to succeed on an equal protection claim under Section 1983, the plaintiff must first demonstrate that he's been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.

For the purposes of showing intentional discrimination, the defendants' knowledge of the plaintiff's protected class is not enough. The plaintiff must plead factual allegations probative of

discriminatory animus.

Although it's not entirely clear from the pleadings, it appears Mr. Allan is alleging disparate treatment based on two bases:

First, based on the officers' decision to credit Daniel Gigi's version of what happened during the pepper spray incident instead of his own and to only arrest Mr. Allan.

Secondly, based on the county's alleged 25 percent increase in the number of racially biased policing complaints and arrest data.

The Court finds neither ground sufficient to plausibly allege disparate treatment.

First, and most problematic for Mr. Allan, there's no allegation in the amended complaint that the officers were even aware of his ethnicity as being Arabic-American. He did not allege that his race or ethnicity are visually apparent. He also does not allege that the officers made any comments about or otherwise acknowledged his race or ethnicity, and the warrants obtained by the officers as attached to the amended complaint list his race as white.

Secondly, Mr. Allan and Daniel Gigi were not sufficiently similarly situated for the purposes of disparate treatment analysis just because they were

both involved in the incident. As the Fourth Circuit has recognized, while similarly situated does not require that the comparators be identical, for selective enforcement claims, qualitative differences in the nature and degree of the comparative offenses matter.

Here, Mr. Allan alleges that Daniel Gigi verbally threatened and threw a carpet at him and later tackled him. By all accounts, if true, that conduct would be sufficient for probable cause of an assault and battery. However, Mr. Allan concedes that he deployed pepper spray on Daniel Gigi. The courts in this district have recognized that devices such as pepper spray possess inherently dangerous characteristics capable of causing serious and perhaps irreparable injury. And the possession or use of a dangerous weapon in connection with criminal conduct is recognized as an important factor for evaluating the severity of that criminal conduct.

So even taking Mr. Allan's allegations as true, the Court, based on allegations in the complaint, concludes that the nature of the parties' conduct was not sufficiently similar for their comparative use in a disparate treatment analysis but are, in fact, materially, in fact, different.

Third, the statistics that Mr. Allan says show that there's generally overrepresentation of people of color being arrested in the county, paired with statistics about racial bias complaints increasing from 2015-2019, though certainly concerning and noteworthy, do not advance his disparate treatment claim. These particular statistics do not logically establish disparate treatment as between him and Mr. Gigi. Plus, they say nothing about causality in this case, much less discriminatory intent.

Plaintiff does not allege any conduct on the part of the officers that makes plausible the conclusion that they arrested him because of racial animus or stereotypes about Arab-Americans. The amended complaint does not allege that the officers ever commented on his race or his appearance. Instead, the amended complaint conclusory alleges that a statement made by Officer Whisner that he looked like the primary aggressor was made solely based on his race.

He alleges the comment was made after speaking to Daniel Gigi for an extended period of time. It is not plausible without more that the comment was based solely on his appearance or solely on his race. Courts in this district have repeatedly dismissed

claims involving similar speculative animus.

For all of these reasons, the Court concludes that the amended complaint fails to state a claim that make plausible this claim, and that count will be dismissed.

Let me speak to Count 3 alleging 1983 violations based on the Fourth Amendment violation.

Probable cause sufficient to justify a seizure or arrest requires that the facts and circumstances within the officer's knowledge at the time of the arrest were sufficient to warrant a prudent person or one of reasonable caution in believing that the suspect had committed an offense. Evidence sufficient to convict is not required, and an officer need not exhaust every potential avenue of investigation before seeking a warrant or making an arrest. With that said, an officer cannot simply ignore exculpatory evidence presented by the suspect that would defeat probable cause.

But critically, and as relevant here, exculpatory evidence does not include claims of self-defense, which does not negate probable cause where other evidence supports a finding of probable cause by the officer on the scene.

The various courts that have considered the

question have generally observed that because self-defense is an affirmative offense to the commission of a crime, which requires its own evidentiary support, claims of self-defense do not affect the existence of probable cause for the commission of the underlying crime itself.

The arrest warrants for which Mr. Allan concludes there was no probable cause were issued for violations of Virginia Code 18.2-312, pertaining to causing the release of a gas or chemical with noxious or nauseating gases, and 18.2-57, pertaining to assault and battery.

Mr. Allan concedes in the amended complaint that he displayed and deployed pepper spray against Daniel Gigi. He also alleges that he was arrested after the officers spoke to both of them.

The fact is that deploying pepper spray at another person is a sufficient basis for both criminal charges under Section 18.2-312 and also the other statute he was charged with.

The officers were provided with information about the altercation from both parties, and Daniel Gigi gave sworn statements in support of the arrest warrant. There was clearly probable cause for the officers to detain and arrest Mr. Allan in connection

with the pepper spray deployment irrespective of whether ultimately the facts allowed various defenses to that charge.

In that regard and on that point, for the contention that the context in which the pepper spray was deployed would have changed the officers' probable cause determination is simply not supported by cases in this area, settled law in this area. Claims of self-defense are irrelevant to a determination of probable cause. Any other rule would require law enforcement officers to take on the role essentially of the jury by weighing the credibility of the various witnesses and strength of self-defense evidence at the investigative stage. Such a requirement would create significant problems in situations precisely like those confronted.

The allegation that the officers did not give equal credit to his statements or listen to the recording or view his personal recording of the incident simply does not create a factual issue about the officers' conduct that cannot be resolved at this stage in the proceedings and, therefore, should allow this case to proceed. Because his own allegations clearly establish facts sufficient to establish probable cause, plaintiff fails to state a Fourth

Amendment claim for detention or arrest without probable cause.

Similarly, the amended complaint fails to allege sufficient facts in support of Mr. Allan's claim that the officers used excessive force in detaining him. At most, the amended complaint alleges that his handcuffs were too tight, which was painful and resulted in bruising. Where the complainant was lawfully arrested, courts have repeatedly rejected tight handcuffs as a basis for a claim of excessive force absent allegations of a permanent or major injury.

So for all of these reasons, the motion to dismiss as to Count 2 based on that claim is dismissed as well.

Let me also speak to the state law claim.

In Count 4, plaintiff makes a claim of false arrest under Virginia state law against these officers. For essentially the same reasons that the Court has dismissed Count 1 pertaining to the 1983 claim based on a Fourth Amendment violation, the amended complaint fails to allege facts that make plausible his false arrest claim under Virginia law. That conclusion is underscored by the existence of probable cause to detain him initially without a warrant. Even given the

underlying conduct for which he was being detained and as set forth in the amended complaint, the officers obtained from the magistrate a facially valid arrest warrant after receiving statements under oath.

Count 4 is therefore dismissed, which leaves the claim against the county for a *Monell* violation.

Under Section 1983, a local government can only be held liable for unconstitutional acts that the government itself actually caused through an official government policy or custom. The Fourth Circuit has enumerated an exhaustive list of ways that a policy or custom can give rise to liability for violations of constitutional rights, including:

One, through an express policy, such as a written ordinance or regulation;

Two, through the decision of a person with final policymaking authority;

Three, through an omission, such as a failure to properly train officers, that manifests deliberate indifference to the rights of citizens; or

Four, through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law.

The amended complaint does not allege an express policy, a decision of a person with final

policymaking authority, or a practice so persistent and widespread as to constitute a custom. Rather, it only asserts that the county failed to properly train its officers in probable cause for arrest.

As the United States Supreme Court has recognized, a local government's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. Thus, to state a claim for a local government's failure to train its employees, the allegations must be sufficient to show deliberate indifference by the local government to the rights of persons with whom the untrained employees come into contact. Deliberate indifference requires proof that the local government was on actual or constructive notice of the issue and disregarded it anyway.

In that regard, the Supreme Court has repeatedly distinguished Section 1983 claims from the classic theory of *respondeat superior*, requiring plaintiffs to allege for the purposes of constructive notice a pattern of similar constitutional violations by untrained employees. A showing of simple or even heightened negligence will not suffice.

Here, the amended complaint does not assert a single incident that occurred in the county that is

similar in nature to the allegations in the amended complaint, nor has it alleged any statistics that are substantively relevant to its allegations about training deficiencies with respect to determinations of probable cause. Rather, the amended complaint relies on statistics from a different timeframe than the incident at issue and equates community complaints about racial bias in policing with investigated or adjudicated cases that demonstrate actual deficiencies in officers' probable cause findings.

Moreover, even if complaints about racial bias were relevant to the probable cause training issue alleged, the statistics relied upon do not provide the Court with any way to determine the scale of the issue as they do not include a total count of the complaints about racial bias in county, nor the percentage of complaints as a share of total arrests.

Instead, the figures merely reflect that the complaints increased over time. The directionality tells the Court nothing about the purported pervasiveness of the issues, let alone the reasons for those issues.

For example, based on the 25 percent increase in complaints between 2015 and 2019, it could have been the case that in 2015, there were five complaints, and

in 2019, there were six.

There's simply insufficient evidence, based on those statistics, to find any persuasive issue, particularly as it relates to the situation as addressed in the complaint.

It is true that plaintiff need not plead specific deficiencies or aspects of a training program in order to state a claim absent discovery because plaintiffs are typically not in a position to do that. The deliberate indifference standard does require that a plaintiff plead the existence of similar incidents resulting from a deficient training program or policy. Here, no such allegations exist.

For all of these reasons, the plaintiff fails to state facts that make plausible a claim against the county, and Count 2 will be dismissed as well.

The Court will issue an order.

Is there anything further?

MR. SAMUEL: Is it dismissed with prejudice, Your Honor?

THE COURT: Yes, it is.

MS. O'BRIEN: Thank you, Your Honor.

MR. HOWLETTE: Thank you.

THE COURT: All right. Thank you.

Counsel is excused.

The Court will stand in recess.

Time: 12:28 p.m.

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/s/
Rhonda F. Montgomery, CCR, RPR